

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>HARRY F. WEINBLATT</b>	:	SMALL CLAIMS
	:	DETERMINATION
	:	DTA NO. 819934
for Redetermination of Deficiencies or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law and New York City Personal Income Tax	:	
pursuant to the Administrative Code of the City of New	:	
York for the Periods Ending December 31, 1998;	:	
December 31, 1999, September 30, 2001 and December	:	
31, 2001.	:	

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Petitioner, Harry F. Weinblatt, 1824 Gardenia Avenue, Merrick, New York 11566, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax pursuant to the Administrative Code of the City of New York for the periods ending December 31, 1998, December 31, 1999, September 30, 2001 and December 31, 2001.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 400 Oak Street, Garden City, New York on August 25, 2005 at 9:15 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (David Frieman).

The final brief in this matter was due by November 4, 2005, and it is this date that commences the three-month period for the issuance of this determination.

***ISSUE***

Whether petitioner was a person required to collect, truthfully account for and pay over the New York State and City income taxes withheld by Global Shoe Company, Inc., from the wages paid to its employees, and if so, whether he willfully failed to perform such duties and is thus liable for a penalty equal in amount to the taxes not collected, truthfully accounted for and paid over.

***FINDINGS OF FACT***

1. Global Shoe Company, Inc. (“Global”) was incorporated in the State of New York on June 30, 1997 and it conducted business as an import wholesaler of women’s shoes and handbags. Global’s showroom and corporate headquarters were located at 12 West 57<sup>th</sup> Street, Suite 801, New York, New York.

2. The U.S. corporation income tax returns filed by Global for the calendar years 1998 and 1999 reported that petitioner, Harry F. Weinblatt, and Gerald Freidman were officers of the corporation with each owning 50% of its common stock. The U.S. corporate return for 1998 indicated that petitioner and Mr. Freidman each received a salary of \$100,000.00 and that these were the only wages paid during the 1998 calendar year. The 1999 U.S. corporate return reported that petitioner and Mr. Freidman each received compensation of \$98,833.00 and that there was a total of \$36,000.00 in wages paid to other employees during 1999. The New York general business franchise tax returns filed by Global for the years 1998 and 1999 were both signed by petitioner as “Vice President.”

3. Global experienced financial problems almost from its inception and it soon fell behind in remitting to the Division of Taxation (“Division”) the New York State and City personal income taxes it had withheld from the wages paid to its officers and employees. On September

1, 2000, Global entered into an Installment Payment Agreement (“IPA”) with the Division for the payment of more than \$16,000.00 in past due withholding taxes, penalties and interest due for the years 1998 and 1999. The IPA was signed by petitioner, and a check in the sum of \$6,000.00, drawn on Global’s corporate checking account and submitted as an initial payment on the IPA, was also signed by petitioner. Pursuant to the IPA, Global was required to make monthly payments of \$492.73 for 24 months; however, Global ceased operations in October 2001, and the \$492.73 monthly installment payments were made only until November 2001.

4. On February 3, 2003, the Division issued four notices of deficiency to petitioner asserting that he was “an Officer/Responsible Person of Global Shoe Company, Inc.” and, as such, was liable, pursuant to Tax Law § 685(g), “for a penalty in an amount equal to the tax not paid” by Global. The following table sets forth the amount asserted due in each Notice of Deficiency and the respective period:

<b>PERIOD ENDED</b>	<b>PENALTY</b>	<b>PAYMENT</b>	<b>BALANCE</b>
12-31-1998	\$688.95	-0-	\$688.95
12-31-1999	\$3,775.65	\$202.91	\$3,572.74
09-30-2001	\$4,238.10	-0-	\$4,238.10
12-31-2001	\$263.90	-0-	\$263.90

5. Petitioner protested the four notices of deficiency by filing a Request for Conciliation Conference with the Division’s Bureau of Mediation and Conciliation Services (“BCMS”). BCMS determined that certain payments had been made against the assessments issued to Global and that the tax due which remains unpaid for the four periods noted above was \$2,642.65, consisting of \$688.95 for the period ending December 31, 1998 and \$1,953.70 for the period ending December 31, 1999. The withholding taxes due from Global for the periods ending September 30, 2001 and December 31, 2001 have been paid in full. Accordingly, on January 9,

2004, BCMS issued a Conciliation Order to petitioner wherein the Tax Law § 685(g) penalty asserted due in the four notices of deficiency dated February 3, 2003 was reduced to \$2,642.65. Petitioner timely protested the Conciliation Order dated January 9, 2004 and this small claims proceeding ultimately ensued.

6. Global's corporate checkbook was kept at its office located at 12 West 57<sup>th</sup> Street, Suite 801, New York, New York, and petitioner signed most, if not all, of the checks drawn on the checkbook. Petitioner admits that he, Mr. Freidman and two unnamed foreign nationals, as a collective group, made all of Global's business and financial decisions.

7. Petitioner submitted in evidence a letter dated June 7, 2004 that he sent to the Internal Revenue Service ("IRS") contesting his liability for any payroll taxes due from Global. On June 17, 2004, the IRS issued a letter to Mr. Forman (the attorney who represented petitioner before the IRS) addressed to "Global Shoe Company, Inc., 21 Boxridge Court, Owings Mills, MD 21117" (this is Mr. Friedman's home address) stating that "This is to confirm our previous conversation stating that the Internal Revenue Service will not be assessing any trust fund liability from Global Shoe Company, Inc. against Harry Weinblatt personally." Neither petitioner's letter nor the IRS's letter identified the period or periods involved. Although petitioner was afforded time post-hearing to submit additional evidence to establish the tax periods covered by these two letters, no further evidence was adduced.

#### ***SUMMARY OF PETITIONER'S POSITION***

8. Petitioner claims that he should not be held as the sole responsible party for the taxes not remitted by Global. Petitioner argues that he had a 25% voice in Global's operations and that all business and financial decisions were made only after consultation and agreement among all four parties. While petitioner knew there was a problem with respect to past due withholding

taxes, he maintains that he did everything in his power to remedy the situation. Petitioner asserts that the corporate checkbook was kept in the New York City office because that was where the showroom was located and that he signed most checks as a matter of convenience, but only after consultation and agreement with the other three individuals.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 685(g) provides as follows:

Willful failure to collect or pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Tax Law § 685(n), in turn, furnishes the following definition of a “person” subject to the section 685(g) penalty:

the term person includes an individual, corporation, partnership or limited liability company or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, or a member, manager or employee of a limited liability company, who as such officer, employee, manager or member is under a duty to perform the act in respect of which the violation occurs.

B. The question of whether someone is a “person” under a duty to collect and pay over withholding taxes is a factual one. Factors which should be considered are, *inter alia*, whether the particular individual signed tax returns, derived a substantial part of his or her income from the corporation, or had the right to hire and fire employees (***Matter of Malkin v. Tully***, 65 AD2d 228, 412 NYS2d 186, 188). Other pertinent areas of inquiry include the person’s official duties, the amount of corporation stock he or she owned, and their authority to pay corporate obligations (***Matter of Amengual v. State Tax Commn.***, 95 AD2d 949, 464 NYS2d 272, 273; *see, Matter of McHugh v. State Tax Commn.*, 70 AD2d 987, 417 NYS2d 799, 801).

C. Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990). Furthermore, if petitioner is found to be a person under a duty as described, it must then be decided whether his failure to withhold and pay over such taxes was willful. The question of willfulness is related directly to the question of whether petitioner was a person under a duty, since clearly a person under a duty to collect and pay over the taxes is the one who can consciously and voluntarily decide not to do so. However, merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is “willful” within the meaning of that term as used in Tax Law § 685(g). As the Court of Appeals indicated in *Matter of Levin v. Gallman* (42 NY2d 32, 396 NYS2d 623), the test is:

whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes. . . . No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required (*id.*, 396 NYS2d at 624-625; *see, Matter of Lyon*, Tax Appeals Tribunal, June 3, 1988).

D. After careful consideration of the entire record, I conclude that petitioner was a person who willfully failed to collect and remit the New York State and City income taxes withheld by Global from employees’ wages and, as such, is liable for the penalty imposed pursuant to Tax Law § 685(g). There is substantial evidence in the record to establish that petitioner was a responsible person, specifically: his status as an officer and stockholder of the corporation, his signature on most, if not all, of the checks drawn on the corporate checking account, his

participation in the financial and business affairs of the corporation, his signature on tax returns and the Installment Payment Agreement, his derivation of substantial compensation from the corporation, and his knowledge that withholding taxes were not being remitted by Global (*see, Matter of Wendel*, Tax Appeals Tribunal, February 3, 2000).

E. Petitioner's assertion that he should be held liable for only 25% of the unpaid withholding taxes and that the other three persons involved in Global's business and financial affairs held liable for the remaining 75% must be rejected. The entire liability is collectible from every person found liable since the penalty under Tax Law § 685(g) is joint and several, provided, however, the Division does not attempt to collect more than the total amount of tax owed for the periods in issue (*Matter of Phillips*, Tax Appeals Tribunal, May 11, 1995; *Matter of Wendel, supra*).

F. The petition of Harry F. Weinblatt is denied and the four notices of deficiency dated February 3, 2003 are, as modified by the Conciliation Order dated January 9, 2004, sustained.

DATED: Troy, New York  
January 19, 2006

/s/ James Hoefer  
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PRESIDING OFFICER